APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

07-1310-bk (L), 07-1319-bk (Con), 07-1325 bk (Con)

IN RE: SPIEGEL, INC. ET AL.,
Debtors,

BICO STUPAKOFF and RUSSELL JAMES,
Appellants,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD. and OTTO SUNISHO INC.,
Appellees.

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of March, two thousand and eight.

Present: HON. JOSEPH M. McLAUGHLIN, HON. RICHARD C. WESLEY, *Circuit Judges*, and HON. BRIAN M. COGAN, *District Judge*.[1]

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Southern District of New York be AFFIRMED.

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[1] The Honorable Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

Appellants Bico Stupakoff and Russell James appeal from a February 26, 2007 decision of the United States District Court for the Southern District of New York (Buchwald, *J.*) affirming three decisions of the United States Bankruptcy Court for the Southern District of New York (Lifland, *J.*). On August 16, 2006, the Bankruptcy Court issued an order denying Appellants' motion for a continuance of the hearing on a motion filed by Peter Rosenbaum Photography Corporation or, in the alternative, for a declaration of the Court that any ruling on Rosenbaum's motion would have no application to any motion or pleading that might be filed by Appellants in the future. On November 1, 2006, the Bankruptcy Court denied Appellants' motion to modify Spiegel's bankruptcy reorganization plan ("Plan") to allow them to participate in a class action lawsuit filed by Rosenbaum as untimely under Federal Rule of Civil Procedure 60(b). The Court also dismissed Appellants' request for a declaratory judgment that they are not bound by the Plan as untimely and, in the alternative, because it failed to state a claim.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues.

We affirm the Bankruptcy Court's decision that Appellants' motion to modify the Plan was untimely under Rule 60(b). "Motions under Rule 60(b) are addressed to the sound discretion of the . . . court and are generally granted only upon a showing of exceptional circumstances." *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990). Review of a denial of a Rule 60(b) motion is subject to an abuse of discretion standard. *See Sierra Club v. U. S. Army Corps of*

Eng'rs, 732 F.2d 253, 257 (2d Cir. 1984). Appellants claim that the Release and Injunction in the Plan are not enforceable as to them because proper notice of the disclosure statement and Plan was not provided to them. Their request is likely governed by subsection (3) of the Rule, which allows a court to "relieve a party . . . from a final judgment, order, or proceeding" because of the "misconduct by an opposing party" among other reasons. Fed. R. Civ. P. 60(b). A "motion [governed by Rule 60(b)] must be made within a reasonable time—and for reason[] . . . (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). Because Appellants' motion was made more than a year after the Bankruptcy Court confirmed the Plan, the Court correctly found that it was untimely under Rule 60(b)(3). Even if the Appellants' motion is properly governed by 60(b)(5) "and/or" (6) as Appellants allege—which we doubt—and the motion's timeliness is thus examined under 60(b)'s "reasonable time" provision, the Court's alternative holding that Appellants' seven-month delay in filing after becoming aware of the Plan's existence was unreasonable is still well within its discretion.

We likewise affirm the Bankruptcy Court's decision that Appellants' request for a declaratory judgment was untimely. "[D]ecisions about the propriety of hearing declaratory judgment actions . . . should be reviewed for abuse of discretion." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995). Though Appellants claim that the abuse of discretion standard does not apply in this appeal, both of their arguments fail. First, the Court's dismissal of Appellants' request as untimely is no different for the purposes of our review than if the Court had explicitly declined to hear Appellants' request as

untimely. *See id.* ("[C]ourts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion."). Second, the language from *Wilton* which Appellants interpret as limiting abuse of discretion review to cases in which there is a parallel state proceeding does no such thing, nor do any of this Court's cases. *See id.* at 290 (declining "to delineate the outer boundaries of [a court's] discretion" in cases arising in different procedural context, not questioning whether courts still *have* discretion in other contexts). The Bankruptcy Court's decision to dismiss Appellants' request as untimely because it was "[e]ssentially . . . a collateral attack on [the] Plan" and Appellants are "precluded from seeking to modify the Confirmation Order and Plan . . . under Rule 60(b) . . . [because Appellants] have not brought their request . . . in a reasonable time" is well within its discretion, as discussed above.

Moreover, Appellants' claim that *Whelton v. Educational Credit Management Corp.*, 432 F.3d 150 (2d Cir. 2005), "bears striking . . . similarities" to this case does nothing to help their cause. That case held that Rule 60(b)'s time-limits applied to a request to "declare one of the provisions of a confirmed plan void." *Id.* at 156 n.2. In addition, *Whelton* does not hold, as Appellants would have it, that a bankruptcy court *must* find that filing a Rule 60(b) motion within two years is reasonable. As in *Whelton*, we are only concerned here with whether the bankruptcy court acted within its discretion. We find that it did, and nothing in *Whelton* requires otherwise.

Finally, we affirm the District Court's ruling that Appellants' appeal from the Bankruptcy Court's August 16th order is moot. Appellants themselves concede that if this Court rules against them on their other two grounds for appeal, as we have, their appeal on this point is moot.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby AFFIRMED.

For the Court

Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 03-11540(BRL)

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06 Civ. 09385(NRB)
06 Civ. 13584(NRB)
06 Civ. 13585(NRB)

IN RE: SPIEGEL, INC. ET AL.,
Debtors,

BICO STUPAKOFF and RUSSELL JAMES,
Appellants,

against

OTTO (GMBH & CO KG), OTTO DOOSAN LTD.
and OTTO SUNISHO INC.,
Appellees.

MEMORANDUM AND ORDER

Appellants Bico Stupakoff and Russell James (the "Photographers") present three appeals against Appellees Otto, Otto Doosan, Ltd., and Otto Sumisho, Inc., from orders of the United States Bankruptcy Court for the Southern District of New York (the "bankruptcy court") dated August 16, 2006 and November 1, 2006 (the "August 16 Order" and the "November 1 Order"). These appeals relate to a bankruptcy reorganization plan (the "Plan") for a company called Spiegel, Inc. ("Spiegel"). In the first appeal addressed herein, case number 06 Civ. 13584, the Photographers challenge the bankruptcy court's

November 1, 2006 dismissal of their request for a declaratory judgment stating that they are not bound by the "release and injunction terms" of the Plan (the "First Appeal"). In the second appeal, case number 06 Civ. 13585, which arises from the same order, the Photographers challenge the bankruptcy court's denial of their motion to modify the Plan so that the Photographers could participate in a class action lawsuit (the "Second Appeal"). In the third appeal, case number 06 Civ. 09385, the Photographers challenge the bankruptcy court's general order that the release and injunction terms of the Plan bar the Photographers from raising certain copyright claims against Appellees the ("Third Appeal"). We address each of these appeals in turn. For the sake of expediency, we refer the reader to the background information provided in the bankruptcy court's August 16 and November 1 Orders. We repeat only the necessary facts in this Memorandum and Order.

THE FIRST APPEAL

The First Appeal stems from an adversary proceeding filed by the Photographers on June 21, 2006. In their "Complaint for Declaratory Judgment" (the "Complaint"), the Photographers sought a declaration that the release and injunction provisions of the Plan do not apply to them because they were "known creditors" who did not receive constitutionally required notice of the Plan prior to the Plan's confirmation.[1] The Photographers seek this judgment

[1] Before extinguishing, releasing, or enjoining claims under a bankruptcy plan, a debtor is required to make reasonably diligent efforts to find all reasonably ascertainable creditors and to provide actual notice to those creditors. *Tulsa Professional Collection Services, Inc. v. Pope*, 484 U.S. 478, 490 (1988).

because they now wish to pursue certain copyright claims that Appellees may argue were released and enjoined by the Plan. Appellees moved to dismiss and the bankruptcy court granted that motion, holding: (1) that the Complaint failed to sufficiently plead that the Photographers were known creditors who did not receive notice prior to the Plan's confirmation, and (2) that the Photographers' motion for a declaratory judgment was an untimely request for relief from a final judgment, i.e. from the bankruptcy court's confirmation of the Plan, under Federal Rule of Civil Procedure 60.

A bankruptcy court's decision to grant a motion to dismiss is reviewed by the appellate court *de nova. See e.g. Conboy v. AT&T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001). Motions to dismiss are governed by Federal Rule 12(b) (6), which applies to the bankruptcy courts through Bankruptcy Rule 7012(b). In reviewing a motion to dismiss, a court merely assesses the legal feasibility of the complaint and does not weigh the evidence that may be offered at trial. In re *Churchill Mortg. Inv. Corp.*, 256 B.R. 664 (Bankr. S.D.N.Y. 2000). Accordingly, a motion to dismiss must be denied unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief". In making this assessment, a court must accept all well-plead allegations as true and must construe those allegations in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 57 (1957).

Having reviewed the Complaint, the bankruptcy court's November 1 Order, and the briefs submitted in connection with this appeal, we affirm the bankruptcy court's dismissal of the Complaint pursuant to Federal Rule 12(b) (6) for the reasons provided in the

November 1 Order. The Photographers have not sufficiently pled that they were known creditors of Spiegel upon confirmation of the Plan. Instead, the Photographers have merely pled that some conjecture or speculation could have led Spiegel to the possibility that the Photographers might, in the future, bring claims against Spiegel or a third party that could be covered by the Plan.[2] Accordingly, we affirm the bankruptcy court's judgment in case number 06 Civ. 13584.[3]

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[2] For instance, the Photographers suggest that Spiegel should have known about the Photographers' claims prior to the Plan's confirmation because a third party, the Rosenbaum photographers, brought a suit alleging similar claims, before the Plan's confirmation, against yet another party, the Appellees. Essentially, the Photographers suggest that Spiegel, upon notice of a lawsuit against Appellees, should have imagined all possible lawsuits against or involving Spiegel that might arise from similar claims in the future. This kind of speculation and conjecture is not required of a debtor. *See e.g. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (no due process requirement for "impracticable and extended searches"); *see also In re U.S.H. Corp. of N.Y.*, 223 B.R. 654, 660 (Bankr. S.D.N.Y. 1998).

[3] We need not review the bankruptcy court's holding that the Photographers' suit for a declaratory judgment is also barred by Federal Rule 60 because the Photographers failed to state a claim sufficient to avoid dismissal under Federal Rule 12(b) (6). Moreover, even if the bankruptcy court had not dismissed pursuant to Rules 12(b) (6) and 60, we have no doubt that it would have declined to use its discretion under the Declaratory Judgment Act to review the Photographers' claims. *See generally Wilton v. Seven Falls Co.*, 515 U.S. 277, 288-90 (1995) (decision not to afford relief under the Declaratory Judgment Act reviewed for abuse of discretion). As the bankruptcy court discussed in the November 1 Order, the Plan confirmed a corporate reorganization involving multiple parties and several hundred million dollars in May of 2005, and the release and

THE SECOND APPEAL

The Second Appeal stems from the bankruptcy court's denial of the Photographers' motion to modify the Plan so that the Photographers could file copyright claims in another court. The Second Appeal involves an actual effort by the Photographers to modify or gain relief from the bankruptcy court's confirmation of the Plan.[4] We affirm the bankruptcy court's decision on this matter for the reasons provided in the November 1 Order, including that the Photographers' efforts to modify or gain relief from the Plan are untimely under Fed. R. Civ. P. 60 because the Photographers could have brought the Complaint as early as November of 2005, but did not actually seek to protect their rights until June of 2006. Thus, the bankruptcy court's decision in case number 06 Civ. 13585 is affirmed.

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injunction provisions of the Plan were key components of that confirmation. The bankruptcy court also noted that the Photographers knew of the Plan and of its release and injunction provisions by November of 2005, but did not bring the Complaint until June 21, 2006 and never requested expedited relief from the bankruptcy court. Given the Photographers' delay in asserting their rights and the reasoning in the November 1 Order, we have no doubt that the bankruptcy court would have declined to apply the Declaratory Judgment Act to the Photographers' claims had it addressed that issue expressly. Thus, even if it were appropriate to remand this case to the bankruptcy court after considering its decisions on Rules 12(b)(6) and 60, which we believe it is not, we would decline to do so given that explicit consideration of the Declaratory Judgment Act would not have yielded a different result.

[4] In this respect, we believe that it differs from the Photographers' effort to seek a declaratory judgment addressed in the First Appeal. See supra note 3.

THE THIRD APPEAL

The Third Appeal stems from a different proceeding, brought on June 22, 2006 by the Rosenbaum photographers and addressed in the August 16 Order. During the Rosenbaum lawsuit, the Photographers moved for a continuation so that the Photographers could make their own motions or, in the alternative, for a declaration that any decision in the Rosenbaum lawsuit would not have any preclusive effect on their Complaint for a Declaratory Judgment addressed in the First Appeal. Essentially, the Rosenbaums had requested relief similar to the declaration sought by the Photographers—that they were not bound by the Plan—and the Photographers wanted a declaration that any decision in the Rosenbaum case would not adversely affect the Photographers' efforts to obtain declaratory relief. The bankruptcy court verbally denied the Photographers' motions on June 22, 2006 and elaborated on that dismissal, *inter alia*, on August 16th.

The Photographers raise a number of challenges to the bankruptcy court's June 22 ruling and August 16 Order. As a practical matter, however, the Photographers' ultimate concern is that the August 16 Order will bar them from pursuing the declaratory relief addressed in the First Appeal.[5] Since we affirm

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[5] "The issue before this court is whether the Bankruptcy Court erred in declaring a non-debtor release contained in the confirmed plan of Spiegel, Inc. and its affiliated debtors . . . to be generally valid and enforceable where (i) the Photographers have raised due process and notice objections to such release, (ii) the Photographers filed a separate adversary proceeding to adjudicate these objections; and (iii) the Photographers have not yet received a hearing on these objections." Brief of Appellants Bico Stupakoff and Russell James, dated October 30, 2006 ("App. Br. 3d Appl.") at 1.

the bankruptcy court's decision in case number 06 Civ. 13584 that the Photographers' Complaint failed to state a claim sufficient to support the declaratory judgment addressed in the First Appeal, the issue raised in the Third Appeal is now moot.

CONCLUSION

For the reasons discussed above, we affirm the bankruptcy court with respect to the First and Second Appeals and dismiss the Third Appeal as moot.

SO ORDERED.

Dated: New York, New York
February 26, 2007

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Cases
Case No. 03-11540(BRL)
(Jointly Administered)

IN RE: SPIEGEL, INC. ET AL.,
Debtors,

Adv. Proceeding No. 06-1554 (BRL)

BICO STUPAKOFF and RUSSELL JAMES,
Plaintiffs,

against

OTTO (GMBH & CO KG), OTTO DOOSAN LTD.
and OTTO SUNISHO INC.,
Defendants.

OPINION AND ORDER DENYING PLAINTIFFS' REQUEST FOR AN ORDER MODIFYING THE PLAN INJUNCTION AND GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court are two motions. First, on August 30, 2006, Bico Stupakoff and Russell James (collectively the "Plaintiffs") filed the Motion to Modify Plan Injunction for Limited Purpose of Filing Claims in Illinois Litigation Pending Adjudication of Validity of Plan Releases (the "Motion to Modify the Plan") relying on Rule 60(b) of the Federal Rules of Civil Pro-

cedure (the "Federal Rules"). The Otto Entities filed an objection to the Motion on October 13, 2006. Second, on October 5, 2006, Defendants Otto Doosan, Ltd., Otto Sumisho Inc., and Otto (GmbH & Co, KG) (collectively, the "Otto Entities" or "Defendants") filed a Motion to Dismiss the Complaint (the "Motion to Dismiss") of Bico Stupakoff and Russell James (the "Complaint") for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules made applicable by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). A hearing was held before this Court on October 18, 2006 and the Court ruled on both motions at the hearing, denying the Plaintiffs' Motion to the Modify the Plan and granting the Defendants' Motion to Dismiss. This opinion and order augments the Court's dispositions on the record of the hearing on the motions.

BACKGROUND

Spiegel Bankruptcy

On March 17, 2003, Spiegel Inc. ("Spiegel") and certain of its direct and indirect subsidiaries (collectively with Spiegel, the "Debtors") filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. In March 2005, this Court entered an order approving the Spiegel disclosure statement and setting a hearing on confirmation of the Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan"). The Plan contained a release and injunction, which released all claims that any entity might hold against Spiegel and the affiliated entities and enjoined parties from bringing suit to attempt to collect the

released obligations[1] (the "Release and Injunction"). By order dated May 25, 2005 (the "Confirmation Order") this Court confirmed the Debtors' Plan. *In re Spiegel, Inc.*, 2005 Bankr. LEXIS 1113 (Bankr. S.D.N.Y. May 25, 2005).

The Peter Rosenbaum Photography Motion[2]

On January 30, 2004, Peter Rosenbaum Photography Corporation ("Rosenbaum") commenced an action against the Otto Entities in the United States District Court for the Northern District of Illinois (the "Illinois Court") seeking damages for improper use of photographs taken by Rosenbaum ("Illinois Complaint"). In November 2005, Rosenbaum requested leave from the Illinois Court to file a Second Amended Complaint, which was a purported class action complaint naming as plaintiffs, among others, Bico Stupakoff and Russell James. In response, the Otto Entities filed a notice to the Illinois Court of the Release and Injunction incorporated into the Confirmation Order. The Illinois Court then instructed the parties to ask this Court for instruction on the applicability of the Release and Injunction on the proceedings before the Illinois Court.

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[1] The total value of the consideration paid by the Otto Entities for the Release and Injunction was not less than $260.4 million.

[2] The Rosenbaum Motion was addressed in more detail by this Court in the Written Opinion/Finding of Fact, Conclusions of Law, and Order signed on August 16, 2006 Denying Motion of Peter Rosenbaum Photography Corporation for a Declaratory Ruling Pursuant to Sections 105(a) and 1109(b) of the Bankruptcy Code, etc. and Denying Related Relief, Case No. 03-11540, ECF No. 4487 (the "August 16 Order"), which is annexed as Exhibit A.

In May 2006, Rosenbaum filed a motion seeking this Court's determination that the Release and Injunction do not bar the Illinois Complaint from going forward (the "Rosenbaum Motion"). The hearing on the Rosenbaum Motion was scheduled for June 22, 2006. On June 21, 2006, the Plaintiffs surfaced for the first time before this Court, requesting a continuance of the hearing on the Rosenbaum Motion or a declaration that any ruling on the Rosenbaum Motion shall have no preclusive effect on any motion or pleading filed by the Plaintiffs. This Court denied both requests.

The Court denied the Rosenbaum Motion and the parties settled an order consistent with this Court's findings on the record. Rosenbaum has appealed the August 16 Order, as have the newly surfaced Plaintiffs.

The Adversary Proceeding

On June 21, 2006, contemporaneously with the filing of the request for an adjournment of the Rosenbaum Motion or a special finding relating to the Rosenbaum Motion, the Plaintiffs commenced an adversary proceeding. The complaint (the "Complaint") alleges that Plaintiffs licensed photographs to Spiegel for its use in its catalogs, that Spiegel subsequently provided the photographs to the Otto Entities for their use and that the Otto Entities used these images without permission or license. The Plaintiffs are seeking declaratory relief that because the Plaintiffs were allegedly known creditors of Spiegel, Inc. and the Otto Entities, yet did not receive specific notice and an opportunity to object to the Release and Injunction contained in the Plan, the Release and Injunction do not apply to them.

THE MOTION TO MODIFY THE PLAN

Plaintiffs seek to modify the Release and Injunction contained in the Plan, so they may file an intervention pleading in Illinois District Court, asserting claims on their behalf and on behalf of other unknown parties[3] holding claims against the Otto Entities. The Plaintiffs allege this relief is appropriate to preserve their rights and avoid the expiration of unspecified statutes of limitations[4] while the appeal of the August 16 Order is pending in the Southern District of New York District Court.

Pursuant to 11 U.S.C. sections 1144[5] and 1127(b)[6], courts have limited jurisdiction to modify a plan of reorganization after substantial consummation. Courts have noted that Bankruptcy Rule 9024 expressly provides that Rule 60(b) of the Federal Rules ("Rule

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[3] At the hearing held on October 18, 2006, counsel for the Plaintiffs repeatedly referred to claims the Plaintiffs have against the Otto Entities and noted that the Plaintiffs believe there are other parties with similar claims that they hoped would join the Plaintiffs in the Illinois litigation in the future.

[4] The Plaintiffs' pleadings do not specify which claims they may be prevented from asserting; what statute of limitations is invoked, nor do they provide any background as to why they have waited until October 18, 2006 to bring to this Court's attention causes of action they have doubtless been aware of since November 2005 when Rosenbaum's Proposed Second Amended Complaint in the Illinois Court named them as proposed class action plaintiffs.

[5] Pursuant to 11 U.S.C. § 1144, a party in interest may request revocation of an order of confirmation only within 180 days of entry of the order of confirmation, and only if approval of the order was procured by fraud.

[6] Pursuant to 11 U.S.C. § 1127(b), "a proponent of a plan or the reorganized debtor" may modify a plan prior to substantial consummation of the plan.

60(b)") does not override the time allowed in section 1144 for filing a complaint to revoke an order confirming a plan. *In re Petition of Board of Directors of Hopewell Intern. Ins., Ltd.*, 281 B.R. 200, 207 (Bankr. S.D.N.Y. 2002). Plaintiffs point out, however, that courts have ruled that Federal Rule 60(b) can be used to relieve a creditor from the operation of a confirmation order and the Plaintiffs therefore urge this Court to find their request appropriate under Federal Rule 60(b)(6). The Second Circuit has held that Rule 60(b) motions are within the discretion of the court, and "are generally granted only upon a showing of exceptional circumstances." *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990), aff'd 501 U.S. 115 (1991). A movant must establish one of the Enumerate grounds for relief under Rule 60(b) and that the harm to the movant (Plaintiffs) outweighs the necessity for finality in the order confirming the plan of reorganization. *In re 401 East 89th Street Owners, Inc.*, 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998). In this case, granting such relief would be improper.

Federal Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. Pro. 60(b). Subsection (6) of Federal Rule 60(b) is properly invoked only when there are extraordinary circumstances justifying relief, when the judgment may work an extreme and undue hardship, and when the asserted grounds for relief are not recognized in

clauses (1)-(5) of the Rule. *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986).

In this case, the Plaintiffs assert that the Release and Injunction in the Plan are not enforceable as to them because proper notice of the disclosure statement and plan was not provided to them. The Otto Entities contend that if Rule 60(b) relief was proper in this case, it should have been requested pursuant to Rule 60(b)(3), which relates to misconduct of a party, which would preclude the Plaintiffs from requesting relief under subsection six. Plaintiffs urge the Court to find their request proper under subsection three. In any case, under subsections three or six, the Plaintiffs have not made the showing required for this Court to consider the relief they are requesting.

Subsections three and six of Federal Rule 60(b) require that a motion be made within a reasonable time,[7] and in the case of subsection three, within one

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[7] Plaintiffs argued at the hearing that pursuant to recent Second Circuit case law, two years is a reasonable time in which to file a motion under Rule 60(b). *Whelton v. Educational Credit Management Corp.*, 150 F.3d 150, 156 fn2 (2d Cir. 2005). The Whelton case is distinguishable, however. As this Court stated at the hearing on October 18, 2006, "It's clear to me that the Plaintiffs in this instance are well outside the comfort zone of the Whelton case and should not be enheartened by its application or putative application to the position they take." Transcript at 26. Whelton involved a Rule 60(b)(4) motion to declare one provision of a plan of reorganization (relating to discharge of student loans) void *ab initio* because it violated the Bankruptcy Code. These Plaintiffs seek to have this Court make a finding that a Release and Injunction in a confirmed plan of reorganization are not enforceable as to the Plaintiffs so that the Plaintiffs may file causes of action on behalf of themselves and a group of unknown plaintiffs with similar causes of action.

year of the order. This Court approved the Confirmation Order in the Debtors' cases on May 25, 2005. In November 2005, Rosenbaum filed the motion requesting leave to file the Second Amended Complaint, included Bico Stupakoff and Russell James as plaintiffs and the Otto Entities filed the notice of injunction. At the very latest, the Plaintiffs knew of their alleged claims against the Otto Entities and knew of the injunction contained in the Confirmation Order by November 2005. Plaintiffs did not file the Complaint until June 21, 2006, and never requested expedited relief. Plaintiffs filed the Motion for Plan Modification on August 30, 2006, fifteen months after the Confirmation Order was approved in these cases, and they requested a hearing date on the Motion for Plan Modification some seventeen months after the Confirmation Order was approved. Under either subsection three, which is arguably the relevant section of Federal Rule 60(b), or subsection six, pursuant to which the Plaintiffs requested relief, the Plaintiffs have not filed their motion in a timely fashion. Furthermore, even if the Plaintiffs contend that their request is timely, they have not demonstrated sufficient extraordinary circumstances or undue hardship to justify rewriting of the provisions of a confirmed plan of reorganization.

Even if the Plaintiffs were able to get past the strict limitation on modifying a confirmation order and plan pursuant to 11 U.S.C. section 1127(b), they would not meet the timing requirements of Rule 60(b) to have their motion considered by this Court.

Accordingly, the Plaintiffs' Motion to Modify the Plan is denied.

THE MOTION TO DISMISS

The Defendants urge this Court to dismiss the Complaint, citing as bases for dismissal the August 16 Order,[8] the doctrines of *res judicata* and equitable mootness, that the claims asserted in the Complaint have no legal basis, and because the Plaintiffs' reliance on inadequate notice is wrong as a matter of law. The Plaintiffs contend that despite the legal positions of the Defendants, the real issue raised by the Complaint is whether the Release and Injunction are enforceable against the Plaintiff Photographers, given the lack of notice to the Plaintiff Photographers that this relief was sought against them. Due process is met if notice is "reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response." *Mullane v. Central Hanover Bank,* 339 U.S. 306, 314 (1950); *In re U.S.H. Corp. of New York,* 223 B.R. 654 (Bankr. S.D.N.Y. 1998).

Rule 12(b)(6) of the Federal Rules, which is made applicable to this proceeding by Rule 7012(b) of Bankruptcy Rules, enables a defendant to move to dismiss a complaint on the ground that it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b). In reviewing a motion to dismiss, a court merely assesses the legal feasibility of the complaint, and does not weigh the evidence that may be offered at trial. *In re Churchill Mortg. Inv. Corp.,* 256 B.R. 664 (Bankr. S.D.N.Y. 2000). A motion to dismiss must be denied unless it, appears beyond doubt that the plaintiff can prove no set of facts in support of its

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[8] As the August 16 Order appeal is currently pending, this Court will not address whether or not that aspect of the Defendants' motion is determinative.

claim which would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 57 (1957). All well-pled factual allegations must be read by the court as true and construed in a light most favorable to the plaintiff. *Conley v. Gibson,* 355 U.S. at 57.

Although this Court is to take the well-pled allegations in the Complaint as true for a motion to dismiss, "'[l]egal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.'" *Mason v. American Tobacco Co.,* 346 F.3d 36, 39 (2d Cir. 2003). The Defendants contend, and this Court agrees, that several key conclusory statements in the Complaint are in fact legal conclusions. They were not well-pled and need not be considered in a light favorable to the Plaintiffs.

The Plaintiffs contend that they were known creditors of Spiegel at the time the disclosure statement was filed because Peter Rosenbaum Photography filed the original Illinois complaint in January 2004. However, the Plaintiffs were not related to the original complaint. The Plaintiffs did not become involved in the Illinois litigation until November 2005, months after the Plan was approved in the Spiegel cases. The Plaintiffs contend that because their causes of action against the Otto Entities are similar to those pled by Rosenbaum in the original complaint filed by Rosenbaum in January 2004, the Otto Entities were also aware of their claims. The Debtors and the Otto Entities are not required to employ a crystal ball, however, when one complaint is filed to determine whether any other similar claims exist. *See Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 490 (1988) (Debtor is required to make reasonably diligent efforts to determine creditors). The un-

supported assertion in the Complaint is not sufficient to require this Court to take the statement as true for the purposes of the Motion to Dismiss.

Plaintiffs do not quarrel with the sufficiency of the publication notice as to unknown creditors, but allege that they were known creditors entitled to a greater level of notice. Plaintiffs state in a conclusory fashion, "Defendants knew or should have known that the Plan granted relief for their benefit, and against the Plaintiffs, and that the Plaintiffs were therefore entitled to notice of such relief, including but not limited to notice of the Plan and Disclosure Statement." Compl. at ¶ 25. Courts require debtors to take reasonably diligent efforts and provide notice of a plan and disclosure statement to reasonably ascertainable creditors. *See Id.* (Everyone who may conceivably have a claim is not entitled to actual notice, rather publication notice is sufficient for creditors who are not reasonably ascertainable). Efforts beyond a careful examination of the Debtors books and records are generally not required. *In re U.S.H. Corp. of New York,* 223 B.R. 654 (Bankr. S.D.N.Y. 1998). Plaintiffs do not allege that a proper examination of the books and records would have uncovered their claim. As pointed out above, the only issue as to due process is whether there is some reasonable basis to infer the existence of the creditors. In this case, there is none, leaving no foundation for the due process argument which is the core of the complaint.

As with the Motion to Modify the Plan, the Motion to Dismiss ultimately is governed by Rule 60(b). Leaving aside the foregoing analysis regarding the factual allegations, and the curbs placed on this Court by 11 U.S.C. sections 1127(b) and 1144, and even taking the allegations pled as true, the Plain-

tiffs have no recourse against the Otto Entities because they would likewise be precluded from seeking to modify the Confirmation Order and Plan in this case under Rule 60(b). This Court finds that the Plaintiffs have not brought their request before this Court in a reasonable time given the discussion above relating to Rule 60(b) and that therefore, no relief is available to the Plaintiffs.

Essentially, this Complaint is a collateral attack on a Plan and Confirmation Order that were approved by this Court over a year ago. Congress has put into place various limitations Bankruptcy Rule 8002 underscores the importance of finality of a court's order approving a disclosure or plan of reorganization. Fed. R. Bankr. Proc. 8002.[9] As noted above, 11 U.S.C sections 1127(b) and 1144 proscribe limitations on modification of a plan of reorganization. *See* fn 5 and 6.

For all of the foregoing reasons, the Motion to Modify the Plan and Confirmation Order is denied and the Motion to Dismiss the Complaint is granted.

IT IS SO ORDERED.

Dated: November 1, 2006
New York, New York

/s/ Hon. Burton R. Lifland
United States Bankruptcy Judge

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[9] While the normal ten day period to appeal other orders of a bankruptcy court may be extended on application of a party in interest, pursuant to Bankruptcy Rule 8002(c), orders of the bankruptcy court relating to confirmation of a plan and approval of the disclosure statement are of such significance to the administration of the case, the parties in interest, and third parties that the court has no discretion to extend the time to file an appeal unless the request for an extension is filed before the time to appeal expires.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Cases
Case No. 03-11540(BRL)
(Jointly Administered)

IN RE: SPIEGEL, INC. ET AL.,
Debtors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION OF PETER ROSENBAUM PHOTOGRAPHY CORPORATION FOR A DECLARATORY RULING PURSUANT TO SECTIONS 105(a) AND 1109(b) OF THE BANKRUPTCY CODE, ETC. AND DENYING RELATED RELIEF

Peter Rosenbaum Photography Corporation ("*Rosenbaum*") brought this motion dated May 4, 2006 (the "*Motion*"), for an order pursuant to sections 105(a) and 1109(b) of the Bankruptcy Code: (1) declaring that Rosenbaum's claims against Otto (GmbH & Co KG) ("*Otto KG*"), Otto Doosan Ltd. (f/k/a Otto Doosan Mail Order Ltd.) ("*Doosan*"), and Otto Sumisho Inc. ("*Sumisho*," and together with Otto KG and Doosan, the "*Named Defendants*") in an action (the "*Illinois Action*") filed in the United States District Court for the District of Illinois (the "*Illinois Court*") are unrelated to the chapter 11 cases of Spiegel Inc. ("*Spiegel*") and certain of its direct and indirect subsidiaries (collectively with Spiegel, the "*Debtors*") and, therefore, are not barred by the release and

injunction provisions of the Debtors' plan of reorganization and related confirmation order; and (2) authorizing such claims to proceed. The Named Defendants' filed an objection to the Motion, dated June 5, 2006 (the "*Objection*") and Rosenbaum filed a Reply in support of the Motion, dated June 15, 2006 (the "*Reply*").

On June 21, 2006, Bico Stupakoff and Russell James (collectively, "*Stupakoff and James*") moved for a continuance of the hearing (the "*Hearing*") on the Motion (the "*Adjournment Motion*") or a declaration of the Court that any ruling on the Motion shall have no preclusive effect on any motion or pleading filed by Stupakoff and James. The Named Defendants objected to the Adjournment Motion, dated June 21, 2006.

The Hearing was held before this Court on June 22, 2006. Having considered all of the evidence, testimonial and documentary, as well as the arguments of the parties, and their Proposed Findings of Fact and Conclusions of Law, and keeping in mind that a court should not blindly accept findings of fact and conclusions of law proffered by the parties, *St. Clare's Hospital and Health Center v. Insurance Company of North America (In re St. Clare's Hospital and Health Center)*, 934 F.2d 15 (2d Cir.1991) (citing *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S. Ct. 1044, 12 L.Ed.2d 12 (1964)), and having conducted an independent analysis of the law and the facts, consistent with the record of the hearing on June 22, 2006 at which this Court made its preliminary findings and conclusions, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

IT IS HEREBY FOUND that:

The Spiegel Chapter 11 Cases

A. On March 17, 2003, each of the Debtors filed a voluntary petition in this Court for relief under chapter 11 of the Bankruptcy Code.

B. Subsequently, Rosenbaum filed a proof of claim for $210,186.75 relating to services performed for the Debtors in the Debtors' cases. This proof of claim was assigned to a third party.

C. This Court takes judicial notice of the docket of the Chapter 11 Cases maintained by the Clerk of the Court or its duly appointed agent, including, without limitation, all pleadings and other documents filed, all orders entered, and all evidence and arguments made, proffered or adduced at, the hearings held before this Court during the pendency of these chapter 11 cases.

The Spiegel Plan

D. By order, dated May 25, 2005 (the "*Confirmation Order*"), this Court confirmed the Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "*Plan*").[1] *In re Spiegel, Inc.*, 2005 Bankr. LEXIS 1113 (Bankr. S.D.N.Y. May 25, 2005). Regarding the events leading up to the hearing on confirmation of the Plan (the "*Confirmation Hearing*"), the Confirmation Order included, *inter alia*, the following findings:

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[1] Unless otherwise specified, capitalized terms and phrases used herein shall have the meanings provided in the Plan. The term "Affiliate" shall have the meaning ascribed to it in the Bankruptcy Code.

E. On March 28, 2005, the Debtors filed their First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (Docket No. 3082) and accompanying First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the First Amended Joint Plan of Reorganization of Affiliated Debtors (Docket No. 3084) (as modified, amended or supplemented from time to time and including all exhibits and schedules thereto, the "Disclosure Statement"). On May 23, 2005, the Debtors filed a Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (Docket No. 3556) (the "Plan")[2] that incorporated certain non-material technical amendments and modifications.

* * *

G. On March 29, 2005, after due notice and a hearing held on March 29, 2005, this Court entered an order (Docket No. 3116) (the "Disclosure Statement Order") that, among other things, (a) approved the Disclosure Statement as containing adequate information, . . . and (f) established notice and objection procedures in respect of confirmation of the Plan, including a form of confirmation hearing notice (the "Confirmation Hearing Notice").

* * *

I. Adequate and sufficient notice of the Confirmation Hearing and other requirements and

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[2] Unless otherwise specified, capitalized terms and phrases used [in the Confirmation Order] have the meanings as defined in the Plan.

> deadlines, hearings and matters described in the Disclosure Statement Order was provided in compliance with the Bankruptcy Code, the Bankruptcy Rules and the Disclosure Statement Order. . . . [T]he Confirmation Hearing Notice was mailed on or about April 5, 2005 to Holders of Claims against and Equity Interests in the Debtors and other parties in interest. . . . [T]he Confirmation Hearing Notice was published, on April 14, 2005 in *USA Today* (National Edition), and on April 15, 2005 in *The New York Times* (National Edition), *The Wall Street Journal* (National Edition), and *The Globe and Mail* (National Edition). No other or further notice of the Confirmation Hearing was or is required.

Confirmation Order, 2005 Bankr. LEXIS 1113, at *3-6.

E. Under the Plan, holders of allowed general unsecured claims, which are classified in Class 4 (which voted to accept the Plan), received distributions of cash and stock in the reorganized Eddie Bauer anticipated to be worth approximately 91% of their allowed claims plus potential recoveries from a Creditor Trust. *See* First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the First Amended Joint Plan of Reorganization of Affiliated Debtors (the "*Disclosure Statement*") p. 15.

F. The Plan, *inter alia*, incorporated a settlement (the "*SHI Settlement*") among various parties, including the Debtors, their official unsecured creditors' committee, and Spiegel Holdings, Inc. ("*SHI*"). SHI was Spiegel's majority shareholder and sole voting shareholder and is an Affiliate of the Named Defendants. Pursuant to the SHI Settlement: (i) SHI

paid $104 million in cash to the Debtors; (ii) Otto KG and certain of its Affiliates retained approximately $26.9 million of general unsecured claims (the "*Otto KG Goods Unsecured Claims*") that were allowed as Class 4 Claims, but their recoveries on those claims were limited so they only would receive approximately 82.8% of their allowed claims (instead of the projected 91% for other Class 4 claims); and (iii) approximately $173.9 million in claims held by Otto-Spiegel Finance GmbH & Co. and SHI (the "*SHI Unsecured Claims*") were treated as claims solely against Spiegel on a non-substantively consolidated basis entitled to a distribution of 2.3% in cash (instead of the projected 91% for other Class 4 claims). Disclosure Statement pp. 9, 16. Thus, the total value of the concessions of Affiliates of the Named Defendants was not less than $260.4 million, representing the sum of: (a) $104 million in cash from SHI; (b) approximately $2.2 million in concessions on the Otto KG Goods Unsecured Claims; plus (c) approximately $154.2 in concessions on the SHI Unsecured Claims. In exchange for these and other concessions, the Plan provided for SHI, Otto KG, and their respective Affiliates—including all of the Named Defendants—(all of whom were among the "*SHI Released Parties*" under the Plan) to receive releases (the "*Plan Release*") from any and all claims arising on or before the Plan's "*Effective Date*" that: (i) the Debtors and their subsidiaries may hold against the SHI Released Parties; or (ii) the Debtors' creditors may hold against the SHI Released Parties related to the Debtors or their subsidiaries. Plan § 13.4.

G. In pertinent part, the Confirmation Order incorporated the Plan Release and enjoined the Debtors' creditors from asserting the released claims

(collectively, the "*Plan Release and Injunction*") and also made related findings and conclusions:

> 28. Rule 9019 SHI Settlement. Pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019, the Plan incorporates the SHI Settlement. *The SHI Settlement plays an important part in the Plan, and absent the releases and corresponding injunction that are critical components of the SHI Settlement, the Released Parties* (including, but not limited to, the Holders of the Otto KG Goods Unsecured Claims and the SHI Unsecured Claims) *would not be willing to enter into the SHI Settlement. The SHI Settlement* is the compromise of disputed claims and a good faith settlement and release of those claims and associated alleged injuries. *Such settlement*, as reflected in the relative distributions and recoveries of Holders of Allowed Claims under the Plan, (i) will save the Debtors and their estates the costs and expenses of prosecuting various disputes, the outcome of which is likely to consume substantial resources of the Debtors' estates and require substantial time to adjudicate and (ii) *have facilitated the creation and implementation of the Plan and benefits the Debtors' estates and creditors.* Accordingly, such settlement is fair, equitable and reasonable.
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> * * *
>
> 32. Releases, Exculpations and Injunctions. Pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a), the settlements, compromises, releases, discharges, exculpations, and injunctions set forth in the Plan and implemented by this Confirmation Order,

including but not limited to the SHI Settlement, are fair, equitable, reasonable, in good faith and in the best interests of the Debtors and their estates, the Reorganized Debtors, the Creditor Trust Debtors, the Creditors' Committee, the Creditor Trust, Eddie Bauer Holdings, and Holders of Claims and Equity Interests. *The releases of non-Debtors under the Plan and related injunctions are fair to Holders of Claims and Equity Interests and are necessary to the proposed reorganization of the Debtors and the successful administration of their estates*, thereby satisfying the requirements of *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), *In re Johns-Mansville*, 837 F.2d 89 (2d Cir. 1988), and *In re Ionosphere Clubs, Inc.*, 184 B.R. 648, 655 (S.D.N.Y. 1995). The record of the Confirmation Hearing and the Chapter 11 Cases is sufficient to support the releases, exculpations and injunctions provided for in Article XIII of the Plan.

* * *

37. Provisions of Plan and Order Nonseverable and Mutually Dependent. The provisions of the Plan and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are nonseverable and mutually dependent.

* * *

41. Binding Effect. Pursuant to section 1141 of the Bankruptcy Code, except as otherwise expressly provided in the Plan, on and after the Effective Date, the Plan and all exhibits thereto

. . . shall bind all Holders of Claims and Equity Interests.

* * *

52. SHI Settlement. The SHI Settlement is a good faith settlement and release of claims and associated alleged injuries, is fair and reasonable and is accordingly approved in all respects pursuant to Bankruptcy Rule 9019(a) and section 1123(b)(3)(A) of the Bankruptcy Code. This Court has found that (a) the SHI Settlement was reached as a result of arm's-length good faith negotiations among the parties, (b) *the SHI Settlement plays a vital part in the Plan, and absent the releases and corresponding injunctions that are critical components of the SHI Settlement, the Released Parties* (including, but not limited to, the Holders of the Otto KG Goods Unsecured Claims and the SHI Unsecured Claims) *would not be willing to enter into the SHI Settlement*, and (c) *such settlement*, as reflected in the relative distributions and recoveries of Holders of Allowed Claims under the Plan, (i) will save the Debtors and their estates the substantial costs and expenses of prosecuting various disputes, the outcome of which is likely to consume substantial re-sources of the Debtors' estates and require substantial time to adjudicate and (ii) *has facilitated the creation and implementation of the Plan and provided substantial benefits to the Debtors' estates and creditors.*

* * *

54. Section 13.4(b) Injunction On the Effective Date, *each Holder of a Claim* (but not shareholders or former shareholders of Spiegel, Inc.

solely in their capacity as shareholders or former shareholders of Spiegel, Inc. or any Governmental Unit) *are hereby permanently enjoined from asserting any and all claims*, obligations, suits, judgments, damages, rights, causes of action and liabilities whatsoever (including those arising under the Bankruptcy Code), whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity or otherwise, based in whole or in part on any act, omission, transaction, event or other occurrence taking place during the period beginning at the beginning of time through and including the Effective Date and *related to the Debtors* or their direct or indirect subsidiaries, including, but not limited, to Contribution Claims, against any of the Released Parties (the "Section 13.4(b) Injunction"). This Section 13.4(b) Injunction shall apply to: (i) any Person or Entity that is or was the Holder of a Claim on or after the Petition Date . . . .

55. Other Injunctions. All Persons or Entities that release claims pursuant to Sections 13.2, 13.3, 13.4 and 13.6 of the Plan are hereby permanently enjoined from (a) commencing or continuing in any manner any action or other proceeding of any kind on any such released claims except as otherwise permitted pursuant to Section 2.6 of the Plan; (b) enforcing, attaching, collecting or recovering by any manner or means of any judgment, award, decree or order on such released claims; and (c) creating, perfecting, or enforcing any encumbrance of any kind on such released claims. . . .

56. Releases. Except as otherwise expressly provided in the Plan, this Confirmation Order or

a separate order of this Court, the release provisions set forth in Article XIII of the Plan are approved.

* * *

86. Substantial Consummation Substantial consummation of the Plan shall be deemed to occur on the Effective Date.

Confirmation Order, 2005 Bankr. LEXIS 1113, at *31-34, 36-38, 48-53, 80-81 (emphasis added).

H. Hence, in entering the Confirmation Order, this Court found, *inter alia*, that: (a) the Plan Release and Injunction were "critical components" of the SHI Settlement, which played "a vital part in the Plan"; and (b) the Plan Release and Injunction were "necessary to the proposed reorganization of the Debtors and the successful administration of their estates." *Id.* ¶¶ 32, 52.

I. The Effective Date of the Plan was June 21, 2005. In connection with the Effective Date, over $260 million in cash and other consideration was contributed to the Debtors' estates on behalf of the SHI Released parties, which included all of the Named Defendants.

The Illinois Action

J. On January 30, 2004, Rosenbaum commenced the Illinois Action against the Named Defendants by filing a complaint in the Illinois Court. On October 25, 2004, Rosenbaum filed its First Amended Complaint (the "*Complaint*") in the Illinois Action. *See* Rosenbaum Memo, Exhibit 2. In the Complaint, Rosenbaum asserted a variety of claims (the "*Initial Copyright Claims*") against the Named Defendants related to the alleged improper use by Doosan and

Sumisho of photographs they received from Spiegel and upon which Rosenbaum alleges it holds the exclusive copyright. The Complaint also asserts that Otto KG is "vicariously liable" for the conduct of Spiegel, Doosan, and Sumisho.

K. The Complaint named Bradford Matson as a defendant in addition to the Named Defendants. Mr. Matson was sued as the Spiegel officer in charge of advertising and of Spiegel's relationship with Rosenbaum. Complaint ¶¶ 96, 99.

L. Also in the Illinois Action, both Doosan and Sumisho contested the Illinois Court's jurisdiction. The Illinois Court found it had jurisdiction over Doosan and Sumisho based on the relationship of the Copyright Claims to Spiegel. Memorandum Opinion and Order, Case No. 04 C767 (N.D. Ill. E. Div. September 26, 2005) (the "*Jurisdiction Opinion*") pp. 6-7. *See* Objection, Exhibit B.

M. Once they all had been served with the Complaint, the Named Defendants brought the Plan Release and Injunction to the Illinois Court's attention in November, 2005. *See* Rosenbaum Memo, Exhibit 4. After a hearing on November 29, 2005, the Illinois Court stayed the Illinois Action subject to any ruling from this Court regarding the scope and application of the Plan Release and Injunction. *See* Rosenbaum Memo, Exhibit 3.

N. Also addressed at the November 29 hearing was a motion of Rosenbaum and certain individuals for leave to file a Second Amended Class Action Complaint against, *inter alia*, the Named Defendants in the Illinois Action. *See* Reply, Exhibit A. Among the proposed plaintiffs for a subsequent proposed Second Amended Class Action Complaint in the

Illinois Action (the "*Class Action Complaint*") were Stupakoff and James. *See* Rosenbaum Memo, Exhibit 1. As drafted, the Class Action Complaint would add additional plaintiffs, an additional defendant, and additional causes of action to those included in the Complaint (collectively, with the Initial Copyright Claims, the "*Copyright Claims*"). The original motion for leave to file a Second Amended Class Action Complaint was continued and stayed pending Rosenbaum's request for relief from this Court. *See* Rosenbaum Memo, Exhibit 3.

The Motions

O. On May 4, 2006, more than five months after the Plan Release and Injunction were brought to the Illinois Court's attention, Rosenbaum filed the Motion [Docket No. 4405] and supporting Memorandum of Law in Support of the Motion of Peter Rosenbaum Photography Corporation ("*Rosenbaum Memo*") [Docket No. 4406]. Thereafter, the Named Defendants filed their Objection [Docket No. 4431], the parties agreed to a two week adjournment of the Hearing, and Rosenbaum filed its Reply [Docket No. 4433].

P. On June 21, 2006, Stupakoff and James filed their Adjournment Motion [Docket No. 4438]. Later that day, the Named Defendants filed their objection to the Adjournment Motion [Docket No. 4441].

CONCLUSIONS OF LAW

IT IS HEREBY DETERMINED THAT:

The Adjournment Motion

1. There is no basis for adjourning the June 22, 2006 hearing on Rosenbaum's Motion, particularly as: (a) the parties and the Court had expended

significant effort to prepare for the Hearing; (b) the Hearing had been adjourned once before; and (c) Rosenbaum, Stupakoff and James each were named as proposed co-plaintiffs in the Class Action Complaint sought to be filed in the Illinois Action. *See* Rosenbaum Memo, Exhibit 1. The Adjournment Motion is denied.

2. Stupakoff and James' alternative request, for a special finding that any ruling on Rosenbaum's Motion shall have no preclusive effect on any motion or pleading filed by Stupakoff and James, has no legal basis or foundation. The request for a special finding is denied.

Jurisdiction and Venue

3. This Court has jurisdiction over these chapter 11 cases pursuant to 28 U.S.C. §§ 157 and 1334. Confirmation of the Plan is a core proceeding under 28 U.S.C. § 157(b)(2) and this Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. A Bankruptcy Court also has inherent or ancillary jurisdiction to interpret and enforce its own orders, including the Confirmation Order, wholly independent of the statutory grant of jurisdiction under 28 U.S.C. § 1334. *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). A Bankruptcy Court's jurisdiction continues post-confirmation to protect its confirmation decree, to prevent interference with the execution of a confirmed plan, and to otherwise aid in its operation. *In re Chateaugay Corp.*, 201 B.R. 48, 64 (Bankr. S.D.N.Y. 1996) (hereinafter "*Chateaugay*") (*citing In re Dilbert's Quality Supermarkets, Inc.*, 368 F.2d 922, 924 (2d Cir. 1966)).

Subject Matter Jurisdiction To Approve Third Party Plan Release

5. This Court has held that "'[f]or purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least "related to" the bankruptcy.'" *Chateaugay*, 201 B.R. at 63 (*quoting Michigan Employment Security Comm'n v. Wolverine Radio Co.*, 930 F.2d 1132, 1141 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992)). This Court further stated that the appropriate test for determining whether a claim is "related to" a debtor is "whether the outcome of a proceeding 'might have any "conceivable effect" on the bankrupt estate' or if the proceeding has 'any significant connection' with the bankrupt estate." *Chateaugay*, 201 B.R. at 63 (*quoting Publicker Indus., Inc. v. U.S.*, 980 F.2d 110, 114 (2d Cir. 1992)). This Court then interpreted the conceivable effect test to be "extremely broad" so as to "find related to jurisdiction in a wide variety of circumstances." *Chateaugay*, 201 B.R. at 63 (citations omitted); *see also In re Singer*, 2002 U.S. Dist. LEXIS 8609, at *14 (S.D.N.Y. 2002). Based on such analysis, this Court then held that it "has the power to enjoin [suits] against non-debtor third parties . . . where, as here, the actions against such third parties have at least a conceivable effect upon the Debtors or implicate the interpretation or enforcement of this Court's orders." *Chateaugay*, 201 B.R. at 66.

6. "'In bankruptcy cases, a Court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the Debtor's reorganization plan.'" *In re Metromedia Fiber Network*, 416 F.3d 136, 141 (2d Cir. 2005) (hereinafter "*Metromedia*") (quoting *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992)

(hereinafter "*Drexel*"); *In re XO Communications, Inc.*, 330 B.R. 394, 436-38 (Bank. S.D.N.Y. 2005). Courts also approve nondebtor releases when: (1) the estate received substantial consideration, *Drexel*, 960 F.2d at 293; (2) the enjoined claims were "channeled" to a settlement fund rather than extinguished, *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93-94 (2d Cir. 1988); *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989); (3) the enjoined claims would indirectly impact the Debtor's reorganization "by way of indemnity or contribution," *Id.*; or (4) the plan otherwise provided for the full payment of the enjoined claims, *Id.*; *Metromedia*, 416 F.3d at 142. In addition, nondebtor releases also may be tolerated if the affected creditors consent. *Id.* (*citing In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993)).

7. In entering the Confirmation Order and incorporating the Plan Release and Injunction, this Court found that the plan release and injunction were "critical components of the SHI Settlement" that played a "vital part in the plan" and were "necessary to the proposed reorganization of the Debtors and the successful administration of their estates." Confirmation Order ¶¶ 28, 32, 52, 2005 Bankr. LEXIS 1113, at *31-33 (Bankr. S.D.N.Y. May 25, 2005). Consequently, this Court had the power to enjoin creditors from bringing actions against the SHI Released Parties both because the Plan Release and Injunction played an important part in the Plan and because a substantial contribution to the Debtors' estates was made on behalf of the SHI Released Parties. *See Metromedia*, 416 F.3d at 141; *Drexel* 960 F.2d at 293.

8. Nonetheless, Rosenbaum contends this Court had "no subject matter jurisdiction over the [Copyright Claims] because such claims will have no practical or legal consequence for the Debtors." Rosenbaum Memo p. 10. Yet, the substantial contributions of cash and other consideration to the Debtors' reorganization—on behalf of the Named Defendants—were an essential component of the Plan. Those contributions provided for certain distributions that otherwise would not have been made available. In fact, the Disclosure Statement projected the Debtors' Plan would provide at least a 91% distribution to the Debtors' general unsecured creditors, whose claims were classified in Class 4, which voted to accept the Plan.

9. As to the Named Defendants sharing an identity of interest with the Debtors such that the Copyright Claims could impact the Debtors, the Named Defendants could have sought contribution and/or indemnification from Spiegel (or its officers and perhaps other Debtors) because, among other things, Spiegel provided the photographs to Doosan and Sumisho and authorized them to use the photos on the basis that use of the photographs was unrestricted. Such contribution claims would have impacted both the allocation of the Debtors' property among creditors (including, potentially, directors and officers' insurance policy proceeds) and altered the Debtors' liabilities. *See Hunnicutt Co. v. TJX Cos., Inc.*, (In re Ames Dept. Stores, Inc.), 190 B.R. 157, 160-161 (S.D.N.Y. 1995) (holding that the Court had jurisdiction over postpetition litigation between nondebtors and that litigation was "related to the bankruptcy case because the outcome of the dispute

has the potential to alter the distributic of the debtor's estate to creditors.") (emphasis added).[3]

10. Still another impact of the Copyright Claims on the Debtors results from the fact the alter ego type claims alleged by Rosenbaum as the sole or partial basis for the Copyright Claims asserted against the Named Defendants are by law property of the Debtors and the resolution of alter ego type claims was integral to the SHI Settlement incorporated into the Plan. *See Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 133 (2d Cir. 1993) ("[G]ranting the bankruptcy trustee exclusive standing to assert alter ego claims furthers the bankruptcy policy of ensuring that all similarly situated creditors are treated fairly: the alter ego action is based upon allegations that if proven would benefit all the debtor's creditors, i.e., making more assets available to satisfy the debtor's debts."); *In re Enron Corp.*, 2003 Bankr. LEXIS 330, at *11 (Bankr. S.D.N.Y. Apr. 17, 2003) ("the trustee or debtor-in-possession would have exclusive standing to maintain a Delaware corporation's alter ego claim of a general nature."). Accordingly, such claims directly impact the Debtors' rights and property. *See Chateaugay*, 201 B.R. at 64-65 (in which this Court stayed lawsuits against nondebtors due, *inter alia*, to concerns about the lawsuits' impact on the debtors' assets and cited *Wolverine* and *Hunnicutt* approvingly).

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[3] Rosenbaum argues that any such contribution or indemnification claims were released under the Plan and, therefore, there is no longer any risk to the Debtors. *See* Reply pp. 11-13. Nevertheless, the potential for such claims must be analyzed at the time of Plan confirmation. Otherwise, virtually no third party plan release would remain valid because in almost every instance the released third party provides a reciprocal release to the debtor.

11. As to the potential impact of the Copyright Claims on any copyrights of the Debtors related to Rosenbaum's photographs, Rosenbaum argues that "[i]t cannot be disputed . . . that Rosenbaum exclusively owns the copyrights in all photographs it created," Reply p. 10, and, therefore, Rosenbaum's pursuit of the Copyright Claims could not have any "conceivable effect" on the Debtors' estate to warrant subject matter jurisdiction. *See Chateaugay*, 201 B.R. at 63. Although Rosenbaum submitted affidavits of Peter Rosenbaum and Bradford Mattson supposedly supporting Rosenbaum's exclusive ownership of the relevant copyrights, *see* Reply, Exhibits B and C, there has been no fact discovery by the Named Defendants in the Illinois Action. Hence, it remains possible that the Named Defendants could show Spiegel had a claim to copyrights on the photographs. Indeed, such a conclusion would be consistent with the allegations in paragraphs 26 to 34 of the Affidavit of Bradford Matson that Spiegel provided Rosenbaum's photographs to the Named Defendants and authorized them to use the photos.[4] *See* Reply, Exhibit C. Thus, several defenses of the Named Defendants to the Copyright Claims could be based on the position that Spiegel owned the copyright on the disputed photos entirely or in part and, therefore, the Copyright Claims seek to impact property of the

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[4] Contrary to Rosenbaum's assertion, the acceptance of the truth of Rosenbaum's fact allegations for the purpose of considering the Motion does not require acceptance of Rosenbaum's legal conclusions or preclude consideration of the Named Defendants' potential defenses. *See* Reply p. 10. Otherwise, a creditor such as Rosenbaum asserting enjoined claims could divest the Bankruptcy Court of subject matter jurisdiction to enforce the injunction just by alleging facts and legal conclusions that would preclude such jurisdiction.

Debtors' estates. *See In re Wolverine Radio Co.*, 930 F.2d at 1143 (risk of collateral estoppel of debtor from litigation against nondebtor enough to confer jurisdiction); *In re Paris Indus. Corp.*, 132 B.R. 504, 507 (D. Me. 1991) (enjoining products liability suit against buyer of debtor's assets based on post sale incident because unless free and clear language of sale order was enforced, purchaser would have grounds to sue the debtor to seek rescission).

12. Consequently, it was appropriate for the Plan Release and Injunction to apply to the Copyright Claims.

The Copyright Claims Are "Related To" The Debtors

13. Rosenbaum argues that even if the Plan Release and Injunction are valid, they do not apply to the Copyright Claims because such claims are not "related to" the Debtors as required by the Plan's language. Nevertheless, any fair reading of the Complaint demonstrates the Copyright Claims are related to the Debtors, including Rosenbaum's allegations that: (a) "Spiegel" and certain of its employees entered into conspiracies with at least some of the Named Defendants to misuse Rosenbaum's copyrighted photographs; (b) the Spiegel executive in charge of advertising was actively involved in the alleged conspiracies to wrongfully use Rosenbaum's photos; (c) pursuant to those conspiracies, Spiegel improperly provided the Named Defendants with Rosenbaum's photos; and (d) Otto KG is "vicariously liable for the wrongful conduct of Spiegel". *See e.g.*, Complaint ¶¶ 1, 2, 8, 12, 96, 99, 128, 129, 133, 134, 142, 144, 210, 215, 219, 226. The Class Action Complaint expands on such allegations regarding the Debtors' involvement.

14. Such allegations demonstrate that rather than being "independent" of the Debtors' conduct, the Copyright Claims are based upon the Debtors' conduct entirely or almost entirely. The additional allegation that Doosan and Sumisho used Rosenbaum's photographs overseas once the conspiracy with Spiegel and its officers had been initiated and the photos had been provided by Spiegel, hardly serves to make the Copyright Claims unrelated to the Debtors. Rosenbaum, however, makes three arguments to show the Copyright Claims are not "related to the Debtors". The Court rejects these arguments.

15. Rosenbaum first argues that a claim is not "related to the Debtors" under the Plan unless a prerequisite for pursuit of the claim is initiation of a lawsuit against the Debtors. Rosenbaum Memo at 5. *See* Reply pp. 5-6 (Rosenbaum submits that its "direct claims" asserted against the Named Defendants for which no Debtor is named as a co-defendant are not "related to the Debtors"). Nonetheless, relevant case law is to the contrary. For example, this Court rejected an identical argument made by Rosenbaum when finding the Court could enjoin lawsuits against nondebtors even though the debtors were not named in those lawsuits:

> Adamson and Back contend that this cause of action [to enjoin their Virginia Action against nondebtors] should be dismissed because the Virginia Action "only seeks recovery against [LTV Vehicle] pursuant to the express terms of the Stipulation and Order and *no recovery is sought against any of the other Debtors*. Defendants' Brief p. 28. As set forth above, the Virginia Action and Adamson's threatened actions do constitute improper collateral attacks on

> this Court's orders. Moreover, since the Debtors are exposed to potential liability (e.g., through an indemnity claim by New AM General) and the other adverse effects set forth above, resulting from such collateral attacks, *the fact that the Virginia Action does not seek a direct imposition of liability against the Debtors (other than to the extent provided in the Stipulation and Order) is irrelevant.*

Chateaugay Corp., 201 B.R. at 68 (emphasis added). Thus, it is irrelevant that Rosenbaum chose not to name any Debtor as a defendant in any of the complaints against the Named Defendants or to file a proof of claim in these cases based on the Copyright Claims. Instead, the plain meaning of the "related to the Debtors" phrase in the Plan encompasses the Copyright Claims because, as found above, the Debtors are integral to the Copyright Claims.[6]

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[6] Contrary to Rosenbaum's suggestion, the phrase "related to" as used in the Plan has a broad meaning based on the very contract interpretation rules Rosenbaum espouses. "In many areas of law . . . the use of 'arising out of' language in a contract is considered unambiguous and viewed as reasonably supporting only a broad reading." *Nycal Corp. v. Inoco PLC*, No. 98-7058, 1998 WL 870192, at *2 (2d Cir. Dec. 9, 1998); *see also Richards v. Princeton Ins. Co.*, 178 F. Supp. 2d 386, 392-93 (S.D.N.Y. 2001) (in the context of insurance policies "[t]he term 'arising out of' is to be interpreted in a broad and comprehensive sense to mean originating from or growing out of . . . ") (internal quotations omitted). The phrase "related to" is even "broader in scope" than "arising out of," does not require a causal relation, has been found to be synonymous with phrases such as "in connection with" "associated with," "with reference to," and "with respect to," and is not ambiguous in spite of its breadth. *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001); *see also Mehler v. Terminis Int'l Co.*, 205 F.3d 44, 49 (2d Cir. 2000) (finding arbitration clause containing "arising

16. Second, Rosenbaum argues that rules of contract interpretation should govern the Court's interpretation of the Plan and such rules require the Plan to be interpreted consistent with existing law. *See* Reply pp. 3-4. Based on that premise, Rosenbaum argues the Court must read limits into the "related to the Debtors" phrase in the Plan Release and Injunction because existing Second Circuit law under *Metromedia* prohibits a third party plan release from granting abusive "blanket immunity" allegedly inherent in a release of the Copyright Claims. *Id.* Yet *Metromedia* merely clarifies the standard for granting third party plan releases, rather than prohibiting any particular kind of release. *See* 416 F.3d at 141-42. Further, as established above, the Plan Release and Injunction were approved in accordance with the standard set forth in *Metromedia* and other Second Circuit precedent, such as *Drexel*.

17. Moreover, *Metromedia* does not stand for the proposition asserted by Rosenbaum. In effect, the

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out of or relating to" language to be "classically broad" and "precisely the kind of broad arbitration clause that justifies a presumption of arbitrability"); *In re Johns Manville Corp.*, 340 B.R. 49, 60 (S.D.N.Y. 2006) ("As the Bankruptcy Court concluded: 'The Court's repeated use of the term "arising out of" and "related to" were not gratuitous or superfluous; they were meant to provide the broadest [third party plan release] protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate.'") (*citing* 2004 WL 1876046, at *31.); *Vt. Pure Holdings, Ltd. v. Descartes Sys. Group, Inc.*, 140 F. Supp. 2d 331, 334-35 (D. Vt. 2001) (the "Second Circuit has . . . held that the ordinary meaning of the term 'related to' was clear, unambiguous, and quite broad . . . and . . . has been defined simply as 'connected by reason of an established or discoverable relation") (citation omitted).

Second Circuit did not interpret the third party plan release in that case so as to conform the release to the Second Circuit standard, but rather found that as written, the release failed to comply with the applicable standard. *See Metromedia*, 416 F.3d at 141-42. Similarly, Rosenbaum's reliance on *XO* is misplaced. The *XO* Court interpreted the third party plan release at issue based on then applicable law not because rules of contract interpretation required such an approach, but rather because the express language of the *XO* plan limited the scope of the release to what was then permissible under applicable law. *See In re XO Communications, Inc.* 330 B.R. at 439-41.

18. Third, Rosenbaum asserts that the Named Defendants effectively admitted the Copyright Claims do not relate to the Debtors because the Named Defendants did not file pleadings in this Court: (a) asserting the Copyright Claims were subject to the automatic stay in these cases; (b) commencing an adversary proceeding seeking to stay the Copyright Claims; or (c) removing Rosenbaum's action to this Court. Rosenbaum Memo at 6-7; Reply p. 7. As to the automatic stay, which only applies to claims against the Debtors, there is no requirement that a claim be subject to the automatic stay in order for the claim to be "related to" the Debtors. As to seeking a discretionary stay or removal of the Copyright Claims, those may be options, but the Named Defendants had no obligation to pursue them and, therefore, there could be no admission if such remedies were not sought. Regardless, the Plan Release and Injunction ultimately obtained by the Named Defendants and their Affiliates constitute the exact relief Rosenbaum suggests the Named Defendants need to have sought.

Estoppel

19. Even, however, if the Copyright Claims somehow were not "related to" the Debtors for purposes of interpretation of the Plan Release and Injunction or for evaluating whether subject matter jurisdiction exists, Rosenbaum would be precluded from asserting those arguments based on collateral estoppel and judicial estoppel arising from Rosenbaum's litigation of personal and subject matter jurisdiction in the Illinois Action.

20. The elements necessary for collateral estoppel here based on a determination in the Illinois Action are: "(1) the issues in both proceedings must be identical; (2) the issue must have been actually litigated and actually decided in the prior proceeding; (3) there must have been a full and fair opportunity to litigate the issue in the prior proceeding; and (4) the resolution of the issue must have been necessary to support a valid and final judgment on the merits." *U.S. v. U.S. Currency in Amount of $119,984*, 304 F.3d 165, 172 (2d Cir. 2002).

21. Rosenbaum concedes that all of the elements for collateral estoppel are present here other than the issues being identical. *See* Reply p. 9, n. 11. In effect: (a) the "related to" issue was "actually litigated and actually decided" in the Jurisdiction Opinion entered in the Illinois Action; (b) the Illinois Action provided "a full and fair opportunity to litigate" the "related to" issue; and (c) the Illinois Court's Jurisdiction Opinion was "necessary" to provide that Court with jurisdiction.

22. As to the issues being identical, Rosenbaum raises the following three points regarding the collateral estoppel impact of the Illinois Court's personal jurisdiction ruling, which found personal jurisdiction

over Doosan in Illinois based entirely on Doosan's alleged connection with Spiegel. Jurisdiction Opinion pp. 4-5, Reply pp. 8-9:

> (a) Rosenbaum argues that the Illinois Court never specified whether it found personal jurisdiction over Doosan based on the "arising out of" standard or the "related to" standard. That distinction, however, is irrelevant because "arising out of" is a subset of "related to". *See Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) (the phrase "related to" is even "broader in scope" than the phrase "arising out of"). Thus, a ruling under either standard would signify the claims against Doosan were "related to" the Debtors.
>
> (b) Rosenbaum suggests the two standards differ because personal jurisdiction is based on whether a defendant's contact is "related to" the controversy while application of the Plan Release and Injunction is based on whether the Copyright Claims "related to" the Debtors. Yet, Rosenbaum's theory is incorrect because the controversy and the Copyright Claims are identical and, in any event, the standards do not differ.
>
> (c) Rosenbaum argues that the Jurisdiction Opinion only covers Doosan on the personal jurisdiction issue. While that is true, as the Copyright Claims include similar allegations against the other Named Defendants, this distinction is irrelevant.

23. Notably, Rosenbaum does not even address the Illinois Court's ruling on subject matter jurisdiction. *See* Reply pp. 8-9. The Illinois Court found

subject matter jurisdiction to entertain the Complaint based entirely on Rosenbaum's allegations of unauthorized predicate acts by Spiegel that the Named Defendants allegedly knew of and induced. Jurisdiction Opinion pp. 6-7 ("In the instant case, any unauthorized reproduction of plaintiff's photographs by Spiegel is a violation of the Copyright Act within the United States and constitutes a predicate act of direct infringement."). Hence, there can be no dispute that the Illinois Court's subject matter determination resolved the issue of whether the Copyright Claims are "related to the Debtors". Consequently, Rosenbaum is subject to collateral estoppel on the "related to" issue.

24. The elements necessary for judicial estoppel to apply here based on the Jurisdiction Opinion are: "[1] the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and [2] the prior inconsistent position must have been adopted by the court in some manner." *Bates v. Long Island R. Co.*, 997 F.2d 1028, 1038 (2d Cir. 1993).

25. Rosenbaum concedes that all of the elements for judicial estoppel are present here other than the issues being identical; i.e., that Rosenbaum asserted a prior inconsistent position in the Illinois Action. *See* Reply p. 9, n. 11. Yet the same analysis applicable to collateral estoppel demonstrates that Rosenbaum asserted a prior inconsistent position in the Illinois Action. Accordingly, judicial estoppel also precludes Rosenbaum's "related to" argument.

Res Judicata

26. Once, as here, a confirmation order has become final and nonappealable, a collateral attack on

the order is precluded by *res judicata* principles and, therefore, the confirmation order is no longer subject to challenge based on the standard applicable to the initial approval of a third party plan release. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938). In *Stoll v. Gottlieb*, the Supreme Court held that the doctrine of *res judicata* precludes a creditor from enforcing a guaranty obligation of a nondebtor once that obligation had been released pursuant to a plan of reorganization of the debtor/primary obligor that has been approved by a final, nonappealable order. The Supreme Court found that *res judicata* applied whether or not the bankruptcy court initially had the power to grant the release, reasoning as follows: "Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter . . . . [Thereafter,] the Court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact." *Id.* (citations omitted).

27. Based on *Stoll v. Gottlieb*, the Fifth Circuit held that the doctrine of *res judicata* prevents a creditor from enforcing a nondebtor's guaranty obligation that was released pursuant to a plan confirmed by a final, nonappealable order. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1054 (5th Cir. 1987). The Fifth Circuit reasoned that "[w]e read *Stoll* to mean, therefore, that at least in the case of a bankruptcy court's exceeding its statutory authority by releasing a guarantor of a debtor, the interest in finality surpasses any threat that courts will engage in drastic overreaching." *Id.* Hence, whether or not this Court properly approved the Plan Release and Injunction in connection with confirmation of the Plan, *res judicata* principles preclude a collateral attack on the Plan Release and Injunction now.

28. Rosenbaum, however, argues that it is not collaterally attacking the Confirmation Order, but merely seeking an interpretation of the Order. *See, e.g.*, Reply pp. 6, 13-15. Rosenbaum's three arguments in this regard are incorrect:

(a) Rosenbaum asserts that the Illinois Court "directed the parties to go to this Court to get an interpretative ruling" and, therefore, Rosenbaum's motion must be viewed as such an attempt. Reply p. 13 (citing Transcript attached as Exhibit A to the Reply). In fact, the Illinois Court found that the Plan Release and Injunction enjoined the Illinois Action unless Rosenbaum could obtain relief in this Court. *See* Reply, Exhibit A; Motion, Exhibit 3. Regardless, a direction by the Illinois Court to seek relief here cannot convert a collateral attack into a request for an interpretive ruling.

(b) Rosenbaum suggests that a collateral attack on a confirmation order only occurs when revocation of a confirmation order is sought based on fraud under section 1144 of the Bankruptcy Code. *See* Reply p. 15. While a request for relief based on fraud certainly is a collateral attack on a confirmation order, there are other types of collateral attacks as well. Here, among other things, Rosenbaum argues the Plan Release and Injunction were improperly approved because: (i) these case are not the type of "rare cases" *Metromedia* viewed as justifying a third party plan release; (ii) prior to entry of the confirmation order, there was inadequate disclosure that the Plan Release and Injunction would apply to the Copyright Claims; and (iii) equitable considerations should preclude such application.

See Reply pp. 4, 5, 18. Yet, prior to and in connection with confirming the Plan, this Court already determined that: (x) the Second Circuit standard for approval of a third party plan release was satisfied here; (y) there was adequate disclosure and notice regarding confirmation of the Plan; and (z) the SHI Settlement "is fair, equitable and reasonable". Confirmation Order ¶¶ G, I, 28, 32, 52.

(c) Rosenbaum contends that *In re XO Communications, Inc.* authorizes postconfirmation interpretation of third party plan releases so they conform with then applicable law. *See* Reply p. 15. Yet *XO* is readily distinguishable because the release at issue was limited "to the fullest extent permitted by law as such law may be extended or interpreted subsequent to the Effective Date." 330 B.R. at 439-41. Hence, unlike here, interpretation of the *XO* plan release in accordance with applicable law was required by the language of the release. Moreover, the *XO* decision actually supports enforcement of the Plan Release and Injunction here because *XO* upheld application of a third party plan release to protect a creditor on whose behalf a substantial contribution was made to the debtor's estate and who had released a potential claim against the debtor for indemnification or contribution. *Id.*

29. Alternatively, Rosenbaum asserts that *Stoll v. Gottlieb* and *res judicata* principles are inapplicable here for four reasons. *See* Reply pp. 16-17. Rosenbaum's first purported distinction, that Rosenbaum only seeks an interpretative ruling of rather than

makes a collateral attack on the Confirmation Order, is rejected above.

30. Rosenbaum's second asserted distinction, that *Stoll* involved greater disclosure of the claim released in the plan at issue, is insignificant because there is no requirement in *Stoll* or Second Circuit cases addressing third party plan releases for such disclosure. *See, e.g., Corbett v. MacDonald Moving Servs.*, 124 F.3d 82, 85-87 (2d Cir. 1997) (upholding application of third party plan release to pension liability asserted against debtor's parent despite no pre-confirmation disclosure expressly stating that the release covered the pension claim).[6]

31. Rosenbaum's third alleged "distinction" of *Stoll* is that *res judicata* does not apply here because the Named Defendants did not list the elements of *res judicata*. Yet those elements are readily established here: (a) the Confirmation Order was a final

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[6] There are multiple other reasons why such disclosure was unnecessary. The plain language of the Plan Release and Injunction signified they covered the Copyright Claims. Further, as Rosenbaum argues the Copyright Claims were unimportant prior to Plan Confirmation, *see* Reply p. 18, there would not have been the sense at that time that the Copyright Claims were of sufficient magnitude to warrant express disclosure. Also, Rosenbaum's argument that the Copyright Claims should have been discussed in the Disclosure Statement, which would not have been sent to purported class plaintiffs who did not file a claim in the Spiegel cases or have their claims scheduled by the Debtors, is inconsistent with Rosenbaum's assertion in the Class Action Complaint, 344, that Rosenbaum's claims were typical of the claims of all class plaintiffs. Additionally, the disclosure cases cited by Rosenbaum such as *In re Wolfson*, 139 B.R. 279 (Bankr. S.D.N.Y. 1992), are inapplicable here because they merely require individual debtors not to hide any of their assets.

judgment; (b) this Court is a court of competent jurisdiction to enter the Confirmation Order; (c) the Confirmation Hearing involved the same parties, i.e., the Named Defendants and creditors of the Debtors such as Rosenbaum; and (d) the Confirmation Hearing involved the same claims, i.e., the Plan Injunction and Release applies to the Copyright Claims.

32. Rosenbaum's fourth attempted distinction is that application of *res judicata* also requires a determination that pursuit of the Copyright Claims "would impair, destroy, challenge, or invalidate the enforceability or effectiveness of the reorganization plan." Reply p. 17 (*citing Sure-Snap Corp. v. State Street Bank and Trust Co.*, 948 F.2d 869, 875-76 (2d Cir. 1991)). Whether or not that is required, it is apparent here that invalidation of the Plan Release and Injunction and loss of the related SHI Settlement consideration exceeding $260 million would impair, destroy, and invalidate the Plan, even if it were possible to implement such steps now.

Equitable Mootness

33. Even without application of *res judicata* principles, courts consistently find that when, as here, a plan has been "substantially consummated," the related confirmation order no longer is subject to review. *See, e.g., Metromedia*, 416 F.3d at 144 (Second Circuit holds that appeal of order confirming a "substantially consummated" plan that included a third party release is equitably moot even though the Second Circuit found that the release in question should not have been approved in the first instance); *In re Loral Space & Communications Ltd.*, 342 B.R. 132, 137-38 (S.D.N.Y. 2006) (dismissing appeal of confirmation order as being equitably moot, based largely on the presumption of equitable mootness and

the appellant's failure to seek a stay of the confirmation order); *In re Trico Marine Services, Inc.*, 343 B.R. 68 (Bankr. S.D.N.Y. 2006) (denying request for plan revocation because "even if [the movant] could prove fraud, the Court could not fashion a remedy that would satisfy the requirements of § 1144." Among other reasons, stock had been issued to creditors under the *Trico Marine* plan and such stock subsequently was traded, which is exactly what has occurred in the Debtors' cases).

34. A plan has been "substantially consummated" when, as here, substantially all of the property proposed to be transferred pursuant to the plan has in fact been transferred, the reorganized debtor has assumed control of the business, and plan distribution has commenced. *Metromedia*, 416 F.3d at 144. Indeed, paragraph 86 of the Confirmation Order expressly provides that "[s]ubstantial consummation of the Plan shall be deemed to occur on the Effective Date." As the Plan's Effective Date has occurred, the Plan was substantially consummated. Therefore, Rosenbaum's Motion is equitably moot.

Equitable Considerations

35. As established above, even if the equities were relevant to the initial approval of a third party plan release, at this point, Rosenbaum's equitable arguments are collateral attacks on the Confirmation Order, which, *inter alia*, found the SHI Settlement to be fair and equitable. Regardless, Rosenbaum's equitable arguments are to no avail:

> (a) Rosenbaum argues the release of the Copyright Claims in particular was not important to the Debtors' reorganization and, therefore, is not covered by the Plan Release and Injunction. Rosenbaum Memo pp. 19-20; Reply

pp. 18-20. Nonetheless, the language of the Plan Release does not distinguish between important and unimportant claims. Moreover, whether or not Rosenbaum's contention is true begs the question. Instead, the issue is whether the Plan Release and Injunction and the related SHI Settlement consideration each were important as whole to the Spiegel cases, not whether each individual claim released was important. There is no question about such aggregate importance, as this Court expressly found. Confirmation Order, 2005 Bankr. LEXIS 1113 at *31.

(b) Rosenbaum contends the Copyright Claims could not be released if the SHI Settlement consideration did not directly reach Rosenbaum on account of the enjoined Copyright Claims. *See* Reply pp. 20-21. Yet, the Second Circuit has rejected that exact argument:

> Appellants also claim that notwithstanding any other limitation on nondebtor releases, good and sufficient consideration must be paid to any enjoined creditor. *Such consideration has weight in equity, but it is not required.* In *Drexel Burnham* the complaining creditors received *none* of the settlement with Drexel's personnel. 950 F.2 at 289, 293.

Metromedia, 416 F.3d at 143 (emphasis added). Notably, this Court specifically found the Plan Release was fair and necessary. Confirmation Order, 2005 Bankr. LEXIS 1113, at *31, 33.[7]

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[7] Moreover, the distribution to all creditors (including Rosenbaum and/or the assignee of its claim) of the substantial settlement consideration contributed on behalf of the Named Defendants and their Affiliates made particular sense here, as key

(c) Rosenbaum argues that Sumisho and Doosan may not benefit from the Plan Release and Injunction because they did not directly contribute to the SHI Settlement. See Reply p. 21. Nevertheless, the making of a single contribution on behalf of multiple beneficiaries of a third party plan release is both customary and acceptable. *See, e.g., In re XO Communications, Inc.*, 330 B.R. at 439-40.

(d) Rosenbaum contends that it should not be subject to the Plan Injunction and Release because Rosenbaum has not had its day in court regarding the Copyright Claims. Yet the notion that each creditor must have fully litigated its claim is unfounded and mutually inconsistent with the concept of a third party plan release.

36. Moreover, Rosenbaum's contention completely ignores the equities favoring the Named Defendants. For example, over $260 million in cash and other consideration already has been contributed to the Debtors' estates on behalf of the Named Defendants and their Affiliates. Further, numerous actions have been taken by all parties in reliance on those contributions and the substantial consummation of the Plan. Also, it appears Rosenbaum made a calculated decision not to file a proof of claim based on the Copyright Claims or to otherwise participate in these cases until now to challenge the Plan Release and Injunction.

37. Accordingly, equitable considerations are of no benefit to Rosenbaum.

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claims asserted against such parties—including those of Rosenbaum—relied in large part on alter ego and other theories assertable for the benefit of all of the Debtors' creditors.

DECREES

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The findings of fact and conclusions of law of this Court set forth herein and at the Hearing shall constitute findings of fact and conclusions of law pursuant to Bankruptcy *Rule 7052*, as made applicable herein by Bankruptcy *Rule 9014*. The findings of fact and conclusions of law of this Court at the Hearing are incorporated herein by reference. To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

2. Stupakoff and James' Adjournment Motion is denied in all respects.

3. The Plan Release and Injunction release the Named Defendants from and enjoin pursuit of the Copyright Claims.

4. Rosenbaum's Motion is denied in all respects.

Dated: New York, New York

August 16, 2006

/s/ Hon. Burton R. Lifland
United States Bankruptcy Judge

APPENDIX E

ADDITIONAL STATUTORY PROVISIONS

Section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 1144 of the Bankruptcy Code, 11 U.S.C. § 1144, provides:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall—
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
>
> (2) revoke the discharge of the debtor.

Federal Rule of Bankruptcy Procedure 7001 provides, in pertinent part:

> An adversary proceeding is governed by the rules of this Part VII. It is a proceeding in a bankruptcy court . . . (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a

> chapter 11 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, . . . [or] (9) to obtain a declaratory judgment relating to any of the foregoing.

Federal Rule of Bankruptcy Procedure 9024 provides:

> Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or § 1330.